89-1657

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DUANE JOSEPH TILLIMON,

Petitioner,

VS.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

JOHN G. RUST, ESQUIRE
833 SECURITY BUILDING
TOLEDO, OHIO 43604
(419) 243-9191

Attorney For Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. In a criminal prosecution for gross sexual imposition where an adult man is charged with loving the parts of a 5 year old boy, and then touching the boy's penis and buttocks, and the case turns on the credibility of the 5 year old boy, and the adult defendant, the 5 year old boy saying on the charge,"...I told him (His Father) that he did it, but really, I don't really know.; does the State deny Defendant a Fair Trial guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution, if the Prosecutor elicits an answer that Defendant refused to take a Lie Detector Test, which on objection, is stricken by the Court, and later, on cross-examination, the

Prosecutor asks Defendant if Defendant in the presence of the Police Officer refused to take a Lie Detector test, and thereupon the Court refused to declare a Mistrial?

2. In the case at bar, does the limitation on a 5 year old to understand the oath and to communicate accurately, even with help from the Prosecutor, the failure of the Prosecutor effectively to comply with the Motion for Separation of Witnesses by telling the State's Witnesses not to talk with each other after testifying, and the inconsistencies of the State's adult witnesses' testimony, here call cumulatively for a judicial declaration that Petitioner Tillimon was denied his constitutional guarantee of a fair trial and due process of law?

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TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. _____

DUANE JOSEPH TILLIMON,

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To The Ohio Supreme Court

OPINIONS BELOW

The only Opinion so far in this case is that of the Court of Appeals, Sixth Judicial District, Lucas County, Ohio, of June 9, 1989, a copy of which is in the Appendix herein, at pages A1.

STATEMENT OF GROUNDS
FOR THE
SUPREME COURT OF THE
UNITED STATES

On November the 15th, 1989, the Supreme Court of Ohio, by its entry of that date, denied Petitioner's Motion to Certify the Record, and this Petition for Writ of Certiorari to the Ohio Supreme Court and the lower Ohio Courts, is filed within ninety days of the said entry of the Ohio Supreme Court. Jurisdiction had been validly invoked in the Ohio Supreme Court, by filing a Notice of Appeal in the Sixth Judicial District Court of Appeals, for Lucas County, on July the 7th, 1989, and then, within the thirty day requirement of the Rules, Petitioner had filed his Memorandum in Support of Jurisdiction in the Ohio Supreme Court, on August the 3rd, 1989.

Prior thereto, after the Judgment and Court Order of Sentence, of July the 26th, 1988, the Petitioner had timely filed his

Notice of Appeal to the Sixth Judicial District Court of Appeals for Lucas County, Ohio, on August the 11th, 1988. Thus, all the filings required by the Rules have been timely and validly filed, and this Petition for Writ of Certiorari is timely and validly filed. Each of the above mentioned filings is reproduced in the Appendix to this Petition, except the Memorandum in Support of Jurisdiction, filed in the Ohio Supreme Court.

STATUTES CONFERRING JURISDICTION ON THE SUPREME COURT OF THE UNITED STATES OF AMERICA

28 U.S.C. 1257, as found in 12 Moore's Federal Practice, at page 8-12 reads in parts here material,

> 1257. State courts; appeal; certiorari
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against the validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a state" includes the District of Columbia Court of Appeals.

[As amended July 29,]970, Pub L 91-358, § 172(a), 84 Stat 590.]

FIFTH, SIXTH, SECTION],
AND, FOURTEENTH AMENDMENTS
TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grant Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;to be confronted with the witnesses against him; to have compusory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On or about the 1st day of April, 1988 the jurors of the Lucas County Grand Jury issued an indictment charging the Defendant with a violation of Ohio Revised Code §2907.05 (A) (3), this being a felong of the third degree. On June 28, 1988 a jury was duly impaneled and trial commenced.

During said trial testimony was elicited on direct examination by the prosecutor from a state's witness concerning a "lie detector" test and an objection was duly entered. (Transcript at p. 55, hereinafter T. p. ____). Subsequently, during the cross examination of the Defendant the prosecution again attempted to elicit testimony concerning the "lie detector" and an objection and motion for mistrial was made (T. p. 253) and subsequently overruled by the trial court (T. pp. 252-265).

Following the taking of testimony by

both the State and the Defendant, arguments of counsel, and deliberations by the jury, a verdict of guilty was entered on the one and only count of the indictment and on the 26th day of July, 1988, the Defendant was sentenced to a period of incarceration and required to pay a fine. The incarceration portion of the sentence was suspended on the condition that the Defendant be incarcerated in the Lucas County Jail for a short period of time and that he be placed on probation for an additional period of time.

Prior to sentencing the Defendant moved for a new trial and moved for a judgment of acquittal. These motions were filed on July 11, 1988 and were overruled by the Trial court on July 26, 1988.

STATEMENT OF FACTS

Duane Joseph Tillimon, hereinafter referred to as Appellant, was charged with engaging in sexual contact with a youngster, Antonio Hernandez, not his spounse, the said

years of age. This is all inviolation of Ohio Revised Code §2907.05 (A) (3). The basic claim of the prosecution was that the Appellant entered into a restroom area at McDonald's, Toledo, Ohio, in which the child was present and at some time during their presence together in the restroom area, the Appellant touched the genitalia, i.e., penis, and buttocks of the child.

During the questioning of Gaspar Hernandez, the father of the child, Mr. Hernandez, in response to questioning by the prosecutor said in part:

> "....and Officer Holt got between us and said just calm down, we'll figure this all out later. You're going to end up taking a lie detector test, and he said I'm not taking nothing unles he takes one first, and I said I don't have a problem with it, and at that point there --
>
> MR. NEWCOMER: Your Honer, I'll move to strike that testimony.
>
> THE COURT: Motion will be granted. The testimony that was just given by the witness will be stricken and the jurors will be instructed to disregard it as I have earlier instructed you that I might

in the event that a motion to strike was granted."

Later in the trial, during the cross examination fo the Petitioner Tillimon, the prosecution gueried at TR 252:

> "Q And it's your testimony that in the presence of Mr. -- or Officer Hold you indicated that you would take a lie detector test, or there was some talk about taking a lie detector test?
>
> MR. NEWCOMER: Your Honor, can we approach the bench?
>
> THE COURT: Yes.
> (Thereupon, an off-the-record discussion was had at the Bence.)
>
> THE COURT: I'm going to sustain the objection."

At that time a motion for a mistrial was made on behalf of the Appellant based on the fact that he was questioned about an offer or an allegation of an offer that he made to take a lie detector test. The court overruled the motion and give a limiting instruction to the jury. The entire dialogue that took place concerning the query about the lie detector test is contained in the transcript

in pages 252 through 265. The actual motion for a mistrial is noted on page 253. The Transcript on this reads at page 252:

"(Thereupon, the following proceedings were had in Chambers:)

THE COURT: Okay, we're in chambers on the record. Defendant is present with counsel, and the prosecutor is here in the person of Mr. Mandross, and we're out of the hearing of the jury. There has been an objection made and a motion made by Mr. Newcomer for a mistrial based on the questioning of the defendant as to an offer or an allegation of an offer that he made to take a lie detector test. Now, Mr. Newcomer, do you want to be heard on your motion?

MR. NEWCOMER: Your Honor, I think when Mr. Hernandez was asked a question and before objection could be made, made some reference to polygraph examination or lie detector examination. There was an objection and there was a motion to strike the testimony, and the Court granted that motion and indicated that it was impermissible area of questioning and admonished the jury that they should not take that into any consideration in thier deliberations.

I think in this particular instance the question has been asked again. I think the prosecution knows that it is an impermissible area to question defendant on, and in fact if any records are brought forward that have anything in it normally those -- any relationship, or any mention of polygraph examinations are specifically deleted, and the only time

that -- that that type of evidence can be gotten in is if the plaintiff -- or the State and the defendant agree to take a polygraph examination and to have the results admitted.

The damage has been done at this point. I've made an objection. He's asked the question, you know. He's going to have to either answer the question or not answer the question, and whatever it is, the inference is going to be that Mr. Tillimon refused to take a polygraph examination, and Ithink that it's twice now in this trial that it's happened and the damage is done. These people are not sophisticated enough if going to have testimony about polygraph examinations in here to get it out of their minds. It's too late. It's been heard."

Prosecutor Mandross then referred to a hand written statement, by Petitioner, which was never admitted into evidence, which statement Petitioner had/given by Attorney Newcomer to Prosecutor Mandross. Prosecutor Mandross argued, at TR 255:

"MR MANDROSS: Your Honor, defense counsel referred to a three-page statement that the defendant wrote out, and the second page of that statement in the third paragraph the defendant in his own hand wrote, "The officer said to me, will you take a lie detector test?' I said, Yes,' "I being Mr. Tillimon. "The officer than took our names. I said, The man' " -- I being the defendant --" The man should take a lie detector test too,' but the

man did not respond." In fact the defendant even put in quotes will you take a lie detector test quote unquate, and his statement, "The man should take a lie detector test too."

I have no problem with a limiting instruction to the jury saying they are not to consider the issue of a lie detector test. I have -- I am not going to ask him whether he took the test or not. I'm not interested in the results of any test, because it didn't happen. The purpose of that question is Officer Holt is going to testify that he never brought up the issue of a lie detector. Officer Holt is going to testify that Mr. Tillimon never said the other man should take a lie detector too.

This whole case evolves around the credibility of a 7-year-old boy and the credibility of the defendant, and if I can bring in testimony that shows that he is testifying in court differently -- he put into writing things that an officer from the Toledo Police Department says is a total fabrication. That certainly should be something the jury should be allowed to consider.

I have no problem with telling -- instructing the jury not to consider the issue itself of a lie detector, whether he took it or not or the results. That's not the focus of my question. I'm interested in whether that statement was

actually made. He says it was. Officer Holt is going to say that's a fabrication.

MR. NEWCOMER: First of all, Your Honor, that's coming in in the back door. Whether the officer asked it or not really isn't material. The problem is the whold thing that Mr. Mandross wants is to get the issue of the polygraph before the jury. I mean, let's just be honest about it.

MR. MANDROSS: No.

MR. NEWCOMER: It doesn't have anything to do with picking out little things as far as if someone's credibility is at stake at this point. It's a question that was asked did you agree to take a polygraph. That's what the question was asked. It didn't have anything to do with did Officer Holt ask it, did anything else like this happen, and that's why the damage is, and if you were going to do it that way, it wasn't done properly.

Second of all, that thing has never been asked to be introduced into evidence. It's a recollection of events that the defendant made at the time. It's not under oath. It was something to assist him, and we gave it to the prosecution, but Mr. Mandross should know that you do not make those comments about the polygrap, and I think that this trial should be terminated at this point and our motion should be granted.

"THE COURT: Well, on cross-examination the credibility of the witmess is at stake, and that's the purpose of cross-examination -- one of the purposes of cross-examination. However, in the area of polygraph tests, I agree that polygraph tests obviously are not admissible except under very limited circumstances. I'm going to sustain you objection, but I'm going to deny your motion for a mistrial, and I will prepare and instruction to the jury regarding the admissibility of lie detector tests, and I will instruct the jury to disregard the question as it was not ansered, and instruct them on the fact that polygraph tests or the results of polygraph tests are not admissible even when --"

The Court then declined Prosecutor's Offer to have Officer Holt testify to show Prosecutor Mandross' Pro-Offer was correct, Tr 259 et seq.

It should be duly noted and emphasized the comment of Prosecutor Mandross with regard to the lie detector offer that he made during the discussion in chamers, was made, despite testimony to the contrary by his own witness Mr. Gasper Hernan-

dez, as quoted above at TR 55 and corroborates the written statement of the defendandant.

STATEMENT OF FACTS SHOWING STATE'S IMPERMISSIBLE EVIDENCE ON DEFENDANT'S ALLEGED UNWILLINGNESS TO TAKE LIE DETECTOR TEST WAS PREJUDICIAL, IN VIEW OF 5 YEAR OLD'S ACKNOWLEDGMENT THAT HE WASN'T SURE DEFENDANT HAD DONE ANYTHING, AND, CUMULATIVELY, THE CONFLICTING INCONSISTENCIES, AND WEAKNESS OF THE STATE'S WITNESS AND CASE.

The child's version of the events leading up to the alleged offense are rather unclear and it is necessary to review his recollection of those events.

Appellant initially objected to Antonio's qualifications to testify. A series of questions were asked by the trial judge, the prosecutor, and the defense attorney. The content of these questions and his responses are contained in the transcript at pages 94 through]08. On page]06, the objection to his testimony was made by the Appellant. This was overruled by the

trial judge. During his direct examination and cross examination the child indicated that the Appellant had pulled his pants down at least three times. He first testified after being asked if he used the bathroom that:

> Uh huh, and he was watching me. He pulled my pants down again like he did. (T. p.]52).

This first statement referred to the period of time in which the child was using the toilet as opposed to the urinal. He then further testified that the Appellant pulled his pants down again and that that was when he was touched. (T. p.]53.)

During cross examination the child identified the diagram of the restroom at the McDonald's Restaurant in Northtowne Mall and then was questioned about his activities in the urinal and toilet area. He indicated that he was trying to use the urinal and that even though he could

almost reach it it was hard. It was then that he indicated that the defendant lifted him up and that the Defendant took his pants down. (T. p.]63). He then contradicted himself by indicating that his pants were already down when he was lifted up. (T. p.]64). In response to the question, "Okay. He didn't do anything to you then, did he?". Answer, "No. Se then he put me - - ." (T. p.]64).

The child then testified that the Appellant assisted in opening the door to the toilet area and that he then went nto the toilet area. The child again testified that the Appellant pulled his pants all the way down to his legs (T. p.]67). However, he then states that as he was standing there that he pulled them back up and looked back and that he (Appellant) was watching him. (T. p.]67). He stated, "He was standing by the door.

It was open a little bit." (T. p. 167). When he asked to describe how much is a little bit such a couple of inches, he stated, "Kind of smaller, I guess." (T. p. 168). He then indicated that he tried to keep it as shut as much as he could (T. p. 168).

He then indicates that he exited the urinal area being followed by the Appellant and that when he was actually touched by the Appellant that his dad was leaning against the door. He said he knew that because he saw his dad when the man left he could see his dad against the doorway. (T. p.]69). His father, Gaspar Hernandez, testified that:

> "Antonio was at the sink right over hear washing his hands. There was a man standing directly behind him again, and as I leaned back, I opened the door a little bit and I saw the guy standing behind him with his hands his pants like this, and that's when I came out the

second time, he was gone out the second door.
(T. p. 43).

After seeing this action he testified that he closed the door to see if his other boy Adrian was done or not and that when he opened the door again the gentleman was gone. (T. p. 42). This is important inasmuch as it is obvious that Antonio did not see his father leaning against the door as he claimed.

It was at this juncture that when Antonio's father exited the commode area that Antonio allegedly indicated what the Appellant had allegedly done to him.

Q. (By Mr. Mandross) Antonio, I'm not clear on something, and maybe you can help me with this. When you said the man touched your penis --

A. (Nodded affirmatively)

Q. (Continuing) -- can you tell me in a little more detail what exactly he did? Can you use your hand to show me.
(T. p. 155).

At this point Prosecutor Mandross bent his knee to the floor and gave hand signals to Antonio how he wanted him to respond. The defendant entered an objection, an off the record discussion was held at the bench, and the objection was sustained. As far as what happened, Antonio was asked:

Q. (By Mandross) Antonio, held me out there, can you?

A. I'm not sure. I don't really know.

Q. Well do you remember telling your dad what the man did?

A. Yes.

Q. What -- how did you explain it to your dad?

A. I told him that he did it, but really, I really don't know. (emphasis added.)

Q. You can't really describe in more detail how he touched you?

A. (Indicated negatively). (T. p. 155, 156).

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS OF THE CIRCUIT COURTS OF APPEAL ARE IN CONFLICT ON THE PREJUDICE AND DENIAL OF CONSTITUTIONAL RIGHTS RESULTING FROM THE PROSECUTOR'S QUESTIONING A DEFENDANT ON HIS UNWILLINGNESS TO TAKE A LIE DETECTOR TEST.

IA. FEDERAL COURT OF APPEALS CASE FINDING A VIOLATION OF CONSTITUTIONAL RIGHTS, AND PREJUDICIAL ERROR FOUND.

In United States v. Brevard, 739 F. 739 F. 2d 180 (CA 4, 1984), the Prosecution's witness stated which could be interpreted that Defendant Brevard took a Lie Detector Test, and then afterwards the FBI decided to arrest him. These points are made clear in 739 F. 2d at page 182:

> [1,2] Evidence that the accused or a witness had taken a polygraph test is inadmissible. See United State v. Holman, 680 F. 2d 1340, 1351-52 (11th Cir. 1982). Where an impermissible reference to a polygraph has been interjected, the court usually may cure the

error by striking the evidence and instructing the jury to disregard it. See, e.g. Holman, 680 F 2d. at 1352; United States v. Smith, 565 F 2d. 292, 295 (4th Cit. 1977) Curative instructions, however, are not always adequate. There are instances where the jury is exposed to inadmissible evidence which could make such a strong impression that instructions to disregard it may not remove its prejudicial effect. See Bruton v. United States, 391 U.S. 123, 129-35, 88 S. CT. 1620, 1624-27, 20 L.Ed. 2d 476 (1968); Throckmorton v. Holt, 180 U.S. 522, 567, 21 S. Ct. 474, 480, 45 L.Ed, 633 (1901).

[3] The most important questions to consider in determining whether a curative instruction or a mistrial is appropriate after a reference to a polygraph test are these: (1) whether an inference about the result of the test may be critical in assessing the witness's credibility, and (2) whether the witness's credibility is vital to the case. See State v. Edwards, 412 A2d 983, 985 (Me. 1980). Obvioulsy, when the witness is a defendant who asserts an alibi, the answers to these questions assume added significance.

[4] In this case, the jury could have drawn an inference from

the polygraph references that was damaging to Brevard. The FBI agent who made the remarks testified that, before going to the FBI office with Brevard for the polygraphy test, "I didn't know at that time whether to believe his story or not." Because the FBI had not charged Brevard before the visit, and he was subsequently indicted, the jury could have inferred that the decision to proceed against him was based partly on the results of the polygraph test and that Brevard had failed it. This inference could have been critical in undermining Brevard's credibility.

This inference could have been especially prejudicial to Brevard because his credibility was a vital issue at trial. Apart from the testimony of some eyewitnesses, which was in certain particulars inconsistent, the evidence against Brevard was circumstantial and partially conjectural. Brevard had an honorable discharge from the Navy. He had worked at the Government Printing Office and was currently employed by the Internal Revenue Service. His counsel elicitied testimony from FBI agents that Brevard had cooperated fully with them. The clerk at smal claims court, Brevard's supervisor, and the woman with whom he lived corroborated the parts of his account within their knowledge. But, in the end,

his defense rested on the jury's willingness to believe his seemingly plausible description of his activities on the morning of the robbery in the fact of plausible conflicting evidence.

The government argues that this court's decision in United States v. Smith, 565 F.2d 292 (4th Cir. 1977) requires affirmance here. In Smith, the government improperly questioned a witness about taking a polygraph examination. Applying the general rule, we hald that a new trial was not warranted where the district judge struck the evidence and instructed the jury to disregard it. 565 F2d at 295. In that case, however, the witness who was questioned about a polygraph test was not the defendant, and there was no indication that his credibility was an important issue. Indeed, in Smith, we distinguished another case which had been reversed because the polygraph evidence concerned a :crucial Government witness ... who the Government attempted to rehabilitate" by asking about a polygraph test. Smith did not foreclose the possibility that a new trial might be required where, as here, the remarks about a polygraph test prejudiced a defendant whose credibility was vital to the case's outcome.

We find no error in the rulings, about which Brevard complains, pertaining to the bank employees' identification of him. The judgment of the district court is reversed, and the case is remanded for a new trial."

II. THE STATE COURTS HAVE DECIDED CASES HOLDING THAT QUESTIONING OF AN ACCUSED DEFENDANT AS TO HIS UNWILLINGNESS TO TAKE A LIE DETECTOR TEST CONTRARY TO SOME FEDERAL COURTS OF APPEAL, AND TO OTHER STATE COURTS, WHICH UPHOLD THE CONSTITUTIONAL RIGHTS OF THE ACCUSED.

We claim that once a Prosecutor has asked if an accused Defendant refused to take a lie detector test that irreparable damages and prejudice has been done, thus denying a Fair Trial guaranteed by the U.S. Constitution.

State cases so holding prejudicial error are:

State v. Kolander, (1952) 236 Minn. 209, 52 N.W. 2d 458;

Mills v. People, (1959) 139 Colo. 397, 339 P. 2d 998;

State v. Britt, (1959) 2353C395, 111 S.E. 2d 669;

State v. Sneed, 98 Ariz. 264, 403 P 2d 816;

State v. Hegel, 9 Ohio App. (2d) 12, (1964) (Defendant held denied a Fair Trial; Court did not give curative instructions).

State v. McDonald, (I2nd App) 328 N.E. 2d 436;

Some States cases hold that the error may be cured by instructions to the Jury. We cite: The Lucas County Court of Appeals in the instant cases:

State v. Holt, 17 Ohio St. 81, (1969) at 83; where the statement was made that Defendant took and failed a Lie Detector Test;

Stallings v. Commonwealth, (1977) 556 S.W. 2d 4;

State v. Bowen, 104 Ariz. 138, 449 Pnd 603;

People v. Baker, 7 Mich. App. 471 152 N.W. 2d 43;

People v. Bobcock, 223 Col. App. 2nd 2d 813, 36 Cal Rptr 178;

Pinkney v. State, (Fla.) 241 SO 2d 380.

I.B. FEDERAL COURTS OF APPEAL DECISIONS DENYING PREJUDICIAL ERROR FROM IMPERMISSIBLE QUESTIONING OF DEFENDANT OF WILLINGNESS TO TAKE LIE DETECTOR TEST.

This Counsel has found but one Federal Court of Appeals case supporting the above.

This general topic is discussed in 95 A.L.R.2d 819, "Propriety and prejudicial effect of comment or evidence as to accused's willingness to take lie detector test," where the text reads in part at page 830:

"§7. Curative action.

[a] Held tending to cure.

It has been held in some cases that the prejudicial effect flowing from a disclosure at a trial of an accused's willingness or refusal to take a lie detector test was cured by action on the part of the trial judge.

In United States v. Bando (1957, CA2 NY) 244 F.2d 833, cert den 355 US 844, 2 L ed 2d 53, 78 S Ct 67, infra § 8[c], a prosecution witness testified that a defendant, after first agreeing to take a lie

> detector test, later refused. The trial judge sustained an objection to this testimony, stating to the jury that there was a difference of opinion as to the scientific validity of such a test. The court held that the trial judge's statement "put its finger on the disbelief," not only of scientists, but of people generally that such tests were reliable, and that the trial judge by his ruling and statement "avoided any unfavorable inferences."

Other state cases are then discussed, supporting the denial of prejudicial effect.

CONCLUSION

The real point of judicial inquiry properly is whether the accused Defendant has been give a Fair Trial. Prosecutors, if so directed by this Court, will take effective steps to prevent deliberate mention of the accused Defendant's alleged unwillingness to take a Lie Detector Test, as the Prosecutor here deliberately did, although he claimed a right to introduce impermissible evidence to impeach. Accidental introduction of a Defendant's unwillingness to take a Lie Detector Test, can be avoided by Motions in Limine. All that this Court need do is so rule, and the Trial Courts throughout our great land will fall in line.

The average person in our area believes in Lie Detectors, and likewise, we submit, throughout the United States.

Here, the Voire Dire of the young 5 year old boy showed his lack of ability,

like any other child his age, really to understand what the oath required. And, the boy's testimony, even with help from the Prosecutor, showed simply that he was not even sure of wrong doing.

Accululatively, the impermissible testimony prejudiced Defendant.

Aour Constitution should prevent injustice.

We respectfully ask this Distinguished and Honorable Court, to issue a Writ of Certiorar to the relevant Ohio Courts.

Respectfully submitted,

John G. Rust
Attorney for Petitioner

CERTIFICATE OF SERVICE

Two copies of the foregoing Petition is served this February 13, 1989 on Dean P. Mandross, Esq., Prosecutor's Office, Lucas County Court House, Toledo, Ohio 43624.

John G. Rust
Attorney for Petitioner

89-1657

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

DUANE JOSEPH TILLIMON,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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(419) 243-9191

Attorney for Petitioner

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Petitioner's Appendix has been mailed by ordinary United States mail to Dean P. Mandross, Lucas County Prosecutor's Office, Lucas County Courthouse, Toledo, Ohio, 43624, this 13th day of February 1990.

John G. Rust
Attorney for Petitioner

C. A. NO. L-88-253

COURT OF APPEALS OF OHIO, SIXTH DISTRICT

COUNTY OF LUCAS

State of Ohio

APPELLEE

vs.

Duane Tillimon

APPELLANT

Filed

June 9, 1989

APPEAL FROM

LUCAS COUNTY

COMMON PLEAS COURT

NO. CR 88-5607

DECISION AND
JOURNAL ENTRY

This matter is before the court on appeal from the Lucas County Court of Common Pleas. Appellant, Duane Tillimon, was found quilty of violating R.C. 2907.05 (A) (3), gross sexual imposition, in connection with fondling the genitalia of a sever-year-old boy in the rest room on McDonald's restaurant. Appellant appeals from his convicion with three assignments of error:

"FIRST ASSIGNMENT OF ERROR
The trial court erred in failing to grant Appellant's motion for mistrial and motion for new trial on the basis

that the mentioning twice of Defendant's willingness or unwillingness to take a lie detector test consititued reversible error.

"SECOND ASSIGNMENT OF ERROR
The trial court committed reversible error and abused its discretion in permitting a child under the age of ten (10) to testify.
"THIRD ASSIGNMENT OF ERROR
The verdict of the jury and judgment of the trial court should be reversed on the basis that the verdict and judgment were against the manifest weight of the evidence."

Appellant's first assignment of error addresses the trial court's refusal to grant a mistrial after the prosecutor made a reference to Tillimon being asked if he would take a lie detector test. At trial, two references to a lie detector were made. The first reference occurred when the father of the victim testified for the state. The father was being questioned about his confrontation of Tillimon outside the rest room. The father had stopped Tillimon and accused him of molesting his son. Security was summoned. Officer Hilt arrived and began speaking to the father and Tillimon.

The father testified as follows:

Q Now, you indicated that the Defendant told you [before Officer Holt arrived] that all he did was snap your son's pants, correct?

"A Right.

"Q Was there a point in time while you're in this hallway where he changes his story or he admits to doing other things?

"MR. NEWCOMER: Objection. He can ask what he stated. He's characterizing it. He can ask what the conversation was.

"THE COURT: I'm not sure I understand the distinction.

"MR. NEWCOMER: He's characterizing testimony right now, and I think he should just ask the question as to what he said.

"THE COURT: All right.

"Q (By Mr. Mandross) Tell the jury what else Mr. Tillimon said during the course of the conversation with you and the officer?

"A I told the officer waht had happened and what my son had told me in the bathroom, and Mr. Tillimon said all I did was snap his pants. I didn't touch the kid, and I said you're a lying lying son of a bitch because I saw you. I was standing behind you, and then he says, oh, I did tuck his shirt in. I'm sorry, I did tuck his shirt in and then I snapped his pants, and by then--

then he told me he was going to excuse me for making such an accusation and started getting a little heated argument there, and Officer Holt got between us and said just calm down, we'll figure this all out later. You're going to end up taking a lie detector test, and he said I'm not taking nothing unless he takes one first, and I said I don't have a problem with it, and at that point there --

"MR. NEWCOMER: Your Honor, I'll move to strike that testimony." (Emphasis added.)

The second reference to a lie detector test was made when the prosecutor was cross-examining Tillimon.

"Q Now, at the point where you're confronted by Mr. Hernandez and he told you of his accusations, you realize that he had in fact seen you doing something with his son, correct?

"A He asked me if I tucked his son's shirt in.

"Q The question is --

"A Yeah, he saw me tuck in his son's shirt.

"Q And you realize that after he approached you and what he said?

"A Right.

"***

"Q And it's your testimony that in the presence of Mr. -- or Officer Holt you indicated that you would take a lie detector test, or there was some talk about taking a lie detector test?

"MR NEWCOMER: Your Honor, can we approach the bench?

"THE COURT: Yes.

"(Thereupon, an off-the-record discussion was had at the Bench.)

"THE COURT: I'm going to sustain the objection."

(Emphasis added.)

Contrary to the inference in the prosecutor's question, Tillimon had not previously testified that he indicated he would take a lie detector test. In fact, Tillimon had not testified at trial in any respect about a lie detector test. Tillimon did, however, testify that he had written down all the events of the incident in question, at his attorney's request, the

the night he was arrested. This writing was not admitted into evidence nor was its substance testified to at trial. Tillimon merely stated that he made the writing and gave a copy to his attorney and to the prosecutor. The writing itself is contained in the record as part of the state's response to a discovery request from Tillimon. the writing states:

> "*** The officer said to me 'will you take a lie detector test?' I said 'yes.' *** I said the man (the victim's father] 'should take a lie detector test, too.' But the man did not respons."

It has been held that "*** neither a professed willingness, nor a refusal to submit to *** a [lie detector] should be admitted." State v. Hegel (1964), 9 Ohio App. 2d 12, 13. In Hegel, testimony regarding a lie detector test was admitted over the defendant's objection, and the jury was not admonished to disregard the

testimony. The court of appeals found this to be prejudicial error, reversed the quilty verdict, and remanded for a new trial.

In the instant case, the trial court sustained Tillimon's objections to both the references to a lie detector test, and gave a limiting instruction each time. The first instruction was as follows:

> "THE COURT: Motion will be granted. The testimony that was just given by the witness will be stricked and the jurors will be instructed to disregard it as I have earlier instructed you that I might in the even that a motion to strike was granted."

The second limiting instruction was:

> "THE COURT: All right, the Court has sustained the defendant's objection, and that mean that you will not hear the answer to the question, and the jury is instructed to disregard the question since a question is only important as it lends meaning to an answer, and I have instructed you on that matter already, and at the close of the case I'll instruct you on it again.
>
> "Now, mention has been made of a polygraph examination, and the

Court is not instructing you, the jury, that polygraph examinations are not an issue in this case, and in fact polygraph examinations are not admissible in evidence at a trial. You are to base your decision and your verdict in this case on the evidence that is here presented and admitted at trial and on nothing else, since polygraph examinations are not admissible at trial.

"It is irrelevant for purposes of this trial as to whether an individual does or does not want to take a polygraph examination."

The issue in this assignment of error is whether defendant's motion for a mistrial or motion for a new trial should have been granted because of these references to a lie detector test. A mistrial may be granted, at the discretion of the trial court, State v. Abboud (1983), 13 Ohio App. 3d 62, if an error or irregularity occurs which prejudicially affects the substantial rights of the accused. See, generally, 27 Ohio Jurisprudence 3d (1981) 86, Criminal Law, Section 868. In State v. Holt (1969), 17

Ohio St. 2d 82, 84, the court held, in connection with a witness's comment on the defendatn having taken a lie detector test and failed it:

> "*** Of course, such testimony was highly improper and no doubt damaging to the defendant, but the trial judge promptly instructed the jurors to disregard such remarks and to erase it from their minds. In view of the court's immediate action in this respect, we do not feel justified in holding that the judge's refusal to order a mistrial was prejedicial error."

The facts in the instant case are somewaht different in that it was the prosecutor who mentioned a lie detector test. While we feel that the prosecutor's tactics were highly questionable, in light of the extensive limiting instructions by the court, we cannot say that the defendant's right to a fair trial was substantially prejudiced by the prosecutor's remark. We, therefore, find appellant's first assignment of error not well-taken.

In his second assignment of error,

appellant challenges the trial court's decision that the victim, a seven year old boy, was competent to be a witness against him. Evid. R. 601(A) states:

> "Every person is competent to be a witness except:
> "(A) Those of unsound mind, and children under ten (10) years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly and;"

The issue of the competency of a witness under the age of ten to testify was addressed in State v. Morgan (1986), 31 Ohio App. 3d 152, where the court stated, at 153-156:

> "The Ohio Supreme Court interpreted this rule [Evid. R. 601 (A)] as meaning that children under age ten are presumptively incompetent to testify. State v. Wilson (1952), 156 Ohio St. 525, 529-530, 46 O.O. 437, 439, 103 N.E. 2d 552, 555; see, also State v. Lee (1983) , 9 Ohio App. 3d 282, 9 OBR 497, 459 N.E. 2d 910. The presumption is rebuttable. Proper judicial procedure requires the trial judge to conduct a voir dire examination of a child under age ten to determine the child's competence to testify. Wilson, supra, at 529. 46 O.O. at 439, 103

N.E. 2d at 555. If the court determines that the child is competent, the child is then permitted to testify.

"***

"The issue of a witness' competence to testify may be likened to other issues of admissibility. See, generally, Evid. R. 104(A). The threshold of admissibility is low, reflecting a policy of favoring the admission of relevant evidence for the trier of fact to weigh as opposed to preliminary admissibility determinations which prevent relevant evidence from reaching the trier of fact at all. See Evid. R. 402. In the same fashion, a child witness' competence to testify is measured by the standard of whether the child is able to receive just impressions of facts and to relate these impressions truly. Evid. R. 601(A). If the child meets that minimal standard, the testimony of the child is received into evidence for the trier of fact to weigh.

"A voir dire examination should consist of questions designed to elicit from the child answers which the court can use to test competence. From the case law it is clear that a child should demonstrate the ability to distinguish truth from falsehood. The child should also be able to reasonably identify the consequences of giving false testimony. *** These considerations form the basis for a competence determination with respect to a child of tender years.

"***

"A trial judge is in a far better position than an appellate court to determine a child's capacity for truth-telling. The judge can observe the child's demeanor, composure, and behavior."
(Footnotes omitted.)

In the instant case, the trial court conducted a voir dire examination of the seven year old witness. The relevant portions of this examination are set forth below.

"THE COURT: Why don't you tell me what your full name is.

"A Antonio Hernandez.

"THE COURT: Okay. And how old are you?

"A Seven.

"THE COURT: Seven. What's your birthday?

"A It's --what?

"THE COURT: When is your birthday?

"A In October, but that's all I know.

"THE COURT: You forget the day?

"A (Nodded affirmatively)

"***

"THE COURT: What grade were you in last year?

"A Kindergarten.

"THE COURT: What grade are you going to be in this next year?

"A I'm not sure if it's going to be second grade or first.

"***

"THE COURT: Okay. And we need to ask you a couple of questions about telling the truth. Do you know what it means to tell the truth?

"A (Nodded affirmatively)

"THE COURT: Waht does it mean to tell the truth?

"A When somebody asks you something to say it's true.

"THE COURT: Well, let me ask you a question like this. You see this robe that I'm wearing?

A (Nodded affirmatively)

"THE COURT: And what color robe is this?

"A Black.

"THE COURT: Black, okay. If I were to say that this robe was white, would I be telling you the truth?

"A (Indicated negatively).

"THE COURT: No. If I told you this robe was white, would that be the truth?

"A No.

"THE COURT: Okay. That would be a lie, wouldn't it?

"A (Nodded affirmatively).

"***

"THE COURT: Okay. And do you understand why it's important to tell the truth?

"A (Nodded affirmatively)

"THE COURT: Why is it important to tell the truth?

"A I'm not sure.

"THE COURT: If somebody asks you a question and they want you to tell the truth, why is it important for you to tell the truth?

"A (Witness shrugged)

"THE COURT: Do your mon and dad teach you about telling the truth?

"A Yeah.

"THE COURT: Okay. And what do they say will happen if you don't tell the truth?

"A Get in trouble.

"THE COURT: Oh, okay. Do you understand what it means if you take an oath, if you swear to tell the truth, if you promise to God to tell the truth? Do you understand what that means?

"A Not really.

"THE COURT: Do you understand what would happen if you didn't tell the truth?

"A (Nodded affirmatively)

"THE COURT: What would happen?

"A Get into trouble.

"THE COURT: Okay. Now, when you come here to talk, do you understand that you need to tell the truth?

"A (Nodded affirmatively).

"THE COURT: Okay. And you understand what would happen if you didn't tell the truth?

"A (Nodded affirmatively)

"THE COURT: What would happen?

"A I'm not sure.

"THE COURT: Well, you said before that if you didn't tell the truth in other cases, like if your mon and dad wanted you to tell the truth and you didn't tell the truth, waht would happen then? What happens when you don't tell the truth?

"A You get in trouble.

"THE COURT: Okay.

"A Sometimes I do. Not all the time.

"THE COURT: Not all the time?

"A Maybe. I don't know.

"THE COURT: Do you get in trouble when somebody finds out you didn't tell the truth?

"A Yeah.

"THE COURT: Do sometimes they don't find out?

"A Well, I don't lie anymore."

We find that the trial court did not abuse its discretion in finding the seven year old boy comptetent to testify. Therefore, we find appellant's second assignment of error not well-taken.

Appellant's final assignment of error alleges that the verdict was against the manifest weight of the evidence.

> "A reviewing court will not reverse a jury verdict where there is substantial evidence upon which a jury could reasonably conclude that all the elements of an offense had been proven beyond a reasonable doubt." State v. Eley (1978), 56 Ohio St. 2d 169, syllabus.

The victim testified that he went into the rest room of McDonals's restaurant alone and then the defendant entered the

rest room. The victim stated that the defendant opened the door to the toilets for him because it was struck and that while he used the toilet, the defendant watched. When he was done using the toilet, he went to wash his hands and the defendant said to him, "Let me tuck your shirt." The victim stated that the defendant pulled his, the victim's, pants down, and, "he -- that's when he touched me ***." The victim stated that the defendant touched his penis and butt with his hand. On cross-examination, the victim testified as follows:

> "Q All right. And at that time you said the man -- you tell me what he did then?
>
> "A When he was tucking my shirt in?
>
> "Q Yeah, he was tucking your shirt in?
>
> "A He touched me.
>
> "Q Okay. And your pants were snapped, right?

"A Oh, no, because he pulled them down again.

"Q He pulled them down again?

"A He pulled my underwear and put his hands in my underwear, and he was also pretending he was tucking my shirt in, and then before he left, he pulled my pants back up, but I don't remember him tucking my shirt in that much."

The defendant testified that he never touched the boy but only helped him get into the toilet stall and tucked in his shirt after he came out of the stall.

We find that based on the victim's testimony there was substantial evidence that Tillimon violated R.C. 2907.05 (A) (3) and the verdict was not against the manifest weight of the evidence. Appellant's third assignment of error is not well-taken.

On consideration whereof, the court finds that the defendant was not prejudiced or prevented from having a fair trial, and judgment of the Lucas County Court of common Pleas is affirmed. It

is ordered that appellant pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See, also, Supp. R. 4, amended 1/1/80.

Peter M. Handword, P.J.
PRESIDING JUDGE

Charles D. Abood, J.
CONCUR.
JUDGE

John J. Conners, Jr., J., dissents.

CONNERS, J. I must respectfully dissent. I would find all three assignments of error well-taken, would reverse and remand to the trial court for further proceedings.

THE SUPREME COURT OF OHIO

1989 TERM

To wit: November 15, 1989

State of Ohio, *

Appellee, * Case No. 89-1372

V. *

ENTRY

Duane Tillimon, *

Appellant.

Upon consideration of the motion for leave to appeal from the Court of Appeals for Lucas County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by N. Stevens Newcomer.

(Court of Appeals No. L88253)

THOMAS J. MOYER
Chief Justice

A-20

NO. CR 88-5607

IN THE COURT OF COMMON PLEAS,
LUCAS COUNTY, OHIO

STATE OF OHIO,	*	FILED:
Plaintiff,	*	July 26, 1988
vs.	*	JUDGMENT ENTRY OF SENTENCE GRANTING
DUANE JOSEPH TILLIMON,	*	PROBATION
Defendant.	*	

* * *

Defendant present in court with counsel N. Steven Newcomer. Asst. Prosecutor Dean Mandross present on behalf of the State of Ohio on this 26th day of July, 1988.

The Court having considered the report of the Lucas County Adult Probation Department and having afforded the defendant and the defense counsel their rights pursuant to Rule 32 (A) (]) ORC, and upon consderation of all matters set forth in all the statutory criteria for sentencing and other matters pertinent to the sentence which

should be imposed, the defendant is hereby ordered to be committed to the Ohio Department of Rehabilitation and Corrections for a period of one and one-half years; pay costs of prosecution.

It is further ordered that execution of sentence is suspended and the defendant is probated to the Lucas County Adult Probation Department for two years on consdition the defendant be of good behavior, comply with the rules and regulations of the Probation Department, that he serve thirty days in Toledo House of Corrections, that he pay a fine of $1500, that he engage in counseling or psychological therapy until no longer necessary, and that he pay costs of prosecution. Stay of execution on days granted pending filing of notice of appeal. Stay of execution on fine granted until

August 9, 1988. Defendant advised of his rights to appeal pursuant to Criminal Rule 32 (A) (2).

Richard W. Knepper
JUDGE

CR NO. 88-5601

IN THE COMMON PLEAS COURT

OF LUCAS COUNTY, OHIO

State of Ohio,	*	
Plaintiff,	*	Judge Knepper
vs.	*	ORDER BY TRIAL COURT ACCEPTING
Duane Tillison,	*	AND ENFORCING THE JURY'S
Defendant.	*	VERDICT
	*	

* * * * *

FROM THE TRANSCRIPT
PROCEEDINGS AT THE TRIAL:

"THE COURT: All right. All right, the Court having polled the jury and having reviewed the verdict form and the verdict form having been signed by all 12 jurors, the Court finds that the verdict has been reached according to law, and the verdict will be accepted and ordered filed and spread across the records of the Court."

NO. CR 88-5607

IN THE COURT OF COMMON PLEAS,
LUCAS COUNTY, OHIO

STATE OF OHIO,	*	Filed
Plaintiff,	*	June 28, 1988
vs.	*	VERDICT
DUANE TILLIMON,	*	
Defendant.	*	

* * * *

THE STATE OF OHIO
vs.
Duane Joseph Tillimon

The Jury empaneled in the above entitled action, having been sworn, well and truly to try, and true deliverance to make between the State of Ohio and

Duane Joseph Tillimon

having been fully advised in the premises, for verdict find and say that, we find the defendant * Guilty of Gross Sexual Imposition, a violation of ORC Section 2907.05(A) (3) as charged in the single count of the indictment.

A-25

*Insert Guilty or Not Guilty.

1. Howard L.Jarnham (sp)
2. James F. Willes
3. Dale B. Jupenhucki (sp)
4. Mary Anne Shull
5. Charles E. Wilson
6. Janet M. Dem (sp)
7. Don Parks
8. Constance A. Morris
9. Susan R. Hanthorn
10. James W. Woodbury (sp)
11. Greig A. Albright
12. Glenn Harris

IN THE COURT OF APPEALS
FOR LUCAS COUNTY, OHIO

Filed: July 7, 1989

State of Ohio	*	Case No.: L 88-253
Appellee	*	NOTICE OF APPEAL TO THE SUPREME
-vs-	*	COURT OF OHIO
Duane Tillimon	*	N. Stevens Newcomer
	*	Supreme Ct. NO:0012978
Appellant		NEWCOMER, MCCARTER
	*	& GREEN
		421 N. Michigan Street
	*	Suite D
		Toledo, Ohio 43624
	*	(419) 255-9100
		Attorney for Appellant
	*	

* * *

Now comes Appellant, Duane Tillimon, by and through his attorney, N. Stevens Newcomer, and gives notice of his appeal to the Supreme Court of Ohio from Order and OPinion issued by the Lucas County Court of Appeals on the 9th day of June, 1989.

The instant case involves a substantial constitutional question.

Respectfully submitted,

By:_____
N. Stevens Newcomer

CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing Notice of Appeal to the Supreme Court of Ohio was hand delivered to the Lucas County Prosecutors Office, Lucas County Courthouse, Toledo, OHio 43624.

N. Stevens Newcomer

IN THE COMMON PLEAS COURT
OF LUCAS COUNTY, OHIO

Filed: August 11, 1988

STATE OF OHIO,	*	Case No. CR 88-5607
Plaintiff	*	Judge Knepper
vs.	*	NOTICE OF APPEAL
DUANE TILLIMON,	*	N. Stevens Newcomer 0012978
Defendant.	*	Counsel for Defendant 421 N. Michigan, Suite A Toledo, Ohio 43624 Telephone: (419) 255-9100
*	*	*

Now comes Defendant, by and through his counsel, and hereby gives notice of his appeal to the Sixth Appellate District of his conviction in the above case for which Defendant was sentenced on July 26, 1988.

Respectfully submitted,

N. Stevens Newcomer
Counsel for Defendant

CERTIFICATION

This is to certify that a copy of the foregoing Notice of Appeal was sent to the Prosecutor's Office, Lucas County Courthouse,

Toledo, Ohio 43624, on this the 21st day of August, 1988.

N. Stevens Newcomer
Counsel for Defendant

IN THE COMMON PLEAS COURT OF
LUCAS COUNTY, OHIO

Filed: July 11, 1988

STATE OF OHIO	*	Case No. CR 88-5607
Plaintiff	*	Judge Knepper
vs.	*	MOTION FOR JUDGMENT OF ACQUITTAL
DUANE TILLIMON	*	
Defendant	*	N. Stevens Newcomer 0012978 Counsel for Defendant 42] N. Michigan, Suite A Toledo, Ohio 43624 Telephone: (419) 255-9100
	*	

* * *

Now comes the Defendant, by and through his attorney, N. Stevens Newcomer, and pursuant to Rule 29 of the Ohio Rules of Criminal Procedure, moves this court for a judgment of acquittal on the basis that the evidence adduced at trial was insufficient to sustain a conviction for the offense of gross sexual imposition..

N. Stevens Newcomer
Counsel for Defendant

A-31

MEMORANDUM

Following the submission of the State's case the Defendant moved for a judgment of acquittal on the basis that the State had failed to establish a prima facie case based on the fact of severe discrepancies in the testimony of the victim. The court overruled this motion and Defendant renewed the motion at the end of the presentation of Defendant's case and again at the end of the prosecution's case in rebuttal. At all junctures the motion was overruled and the matter was submitted to the jury.

On June 29, 1988 the jury returned a verdict of guilty on the single count indictment and the matter was referred to probation pending sentencing.

Based on the arguments and the evidence that was adduced at trial, Defendant would renew hia morion doe jusfmwnr od acquittal pursuant to Rule 29 of the Ohio Rules of

Criminal Procedure.

N. Stevens Newcomer
Counsel for Defendant

CERTIFICATION

This is to certify that a copy of the foregoing Motion and Memorandum was sent to Mr. Dean Mandross, Prosecutor's Office, Lucas County Courthouse, Toledo, Ohio 43624, on this the]]th day of July, 1988.

N. Stevens Newcomer
Counsel for Defendant

CR NO. 88-5607

IN THE COMMON PLEAS COURT
OF LUCAS COUNTY, OHIO

State of Ohio, * Filed
July 11, 1988
Plaintiff, * Judge Knepper
vs. * MOTION FOR A NEW TRIAL
Duane Tillimon *
Defendant. N. Stevens Newcomer
Counsel for Defendant
* Newcomer & McCarter
421 N. Michigan,
* Suite A
Toledo, Ohio 43624
* Telephone: (419)
255-9100

* * * *

Now comes the Defendant, Duane Tillimon, by and through his attorney, N. Stevens Newcomer, and pursuant to Rule 33 of the Ohio Rules of Criminal Procedure moves this court for a new trial.

N. Stevens Newcomer (S)

N. Stevens Newcomer
Counsel for Defendant

MEMORANDUM

I. FACTS

A-34

The Defendant, Duane Tillimon, was charged in a single count indictment alleging gross sexual imposition in violation of Ohio Revised Code §2907.05. The alleged victim was Antonio Gernandez, a child of 8 years of age. The offense occurred in the Northtown Mall which is in the City of Toledo, Lucas County, Ohio, at a McDonald's Restaurant restroom. The victim allegedly was fondled both on his buttocks and on his penis by the Defendant during a very brief encounter when at least two adults and one other child were present.

Following a brief period during which the Defendant could not be found, a confrontation took place between the Defendant and Gaspar Hernandez, the victim's father. While the contents of that conversation are in dispute and there is a dispute as to who was present during the conversation, it was established that the Defendant remained at

the scene, made no attempt to leave, and at all times then and thereafter cooperated with the toledo Police Department in its investigation.

It is also disputed as to whether or not the Defendant's father, Gaspar Hernandez, could have actually seen what he claimed to have seen, i.e., the placing of both hands in the pants of the alleged victim. The Defendant has claimed all along that he was merely tucking in the boy's shirt and that he in no way intentionally touched any erogenous zone of the alleged victim. The victim made some excited utterances to his father and supposedly demonstrated what had happened. However, when he testified he did not indicate that he was touched in the manner described by his father, but indicated that whatever had happened was a passing of the hand over his genital area, which was consistent with the Defendant's testimony that he merely tucked in his shirt and that that could have caused the touching.

It was very evident that the primary concern of the trier of fact was the credibility of two persons, namely, the Defendant Duane Tillimon and the victim Antonio Hernandez. The encounter was extremely brief and it was an encounter that took place in a restroom servicing a very crowded restaurant. Therefore anything tending to focus upon the credibility of the Defendant was of crucial importance in this trial. Because the testimony of the Defendant, Gaspar Hernandez, and Mrs. Hernandez differed on matters that arose some time after the incident, it was necessary for the court to be especially sensitive to matters that are not permissible subjects of inquiry.

On two occasions, once during the State's case in chief and once during the cross-examination of the Defendant, the prosecution directed questions to Gaspar Hernandez and to Duane Tillimon concerning the offer to take a polygraph examination. Mr. Hernandez responsed to a question by the prosecutor by

by saying that he had asked the Defendant to take a polygraph test and that he had refused. An objection was made at that time and the court gave a cautionary instruction to the jury. During the cross-examination of the Defendant, the prosecution asked the Defendant if he had not indicated on his written statement that he was willing to take a polygraph examination. This was obstensibly to show discrepancy between comments made to Mr. Hernandez and Mr. Tillimon's later written statement. This was supposedly solely for impeachment purposes and had nothing to do with the willingness or unwillingness to take the polygraph to demonstrate guilt or innocence.

Following the question to the Defendant an objection was entered and a motion for a mistrial was made based upon that question and the prior question and response by Mr. Gaspar Hernandez relative to the polygraph examination.

II. THE LAW

Pursuant to Rule 33 (A) (4) the Defendant would move for a new trial because the verdict was not sustained by sufficient evidence. It was incumbent upon the State to prove beyond a reasonable doubt the Defendant had "sexual contact" pursuant to the dictates of §2907.05 (A) (3) for the purpose of "sexually arousing or gratifying" himself. The victim's testimony concerning the encounter differs from that of his father who claimed to have witnessed. it. The victim indicated that his trousers were pulled all the way down and that he was fondled on his buttocks and his penis directly. His earlier statement to the investigation officer indicated that he had been fondled through his underwear. Furthermore, the testimony of the victim's father indicated that he saw the Defendant with both hands inside the victim's pants as if he were "tucking in his shirt". Regradless of the nature of the act itself, it all took place within a very brief period of

time.

When the victim testified as to how he was fondled he was unable to demonstrate initially and could only demonstrate after being prompted by the prosecutor during re-direct examination. Based upon the testimony of the Defendant who indicated that he was only tucking in his shirt, the testimony of Gaspar Hernandez who corroborated the testimony of the Defendant in the fact that he also told the investigating officer that it looked like he was "tucking in his shirt", and the discrepancies between the testimony of the father and the son, the Defendant would say that as a matter of law that the evidence was not sufficient to sustain a verdict.

Defendant further urges that he is entitiled to a new trial pursuant to Ohio Rule of Criminal Procedure 33(A) (1) and (5). Inasmuch as the entire conviciton rests upon whether or not the Defendant was attempting to sexually gratify himself by a touching of the victim, the credibility of the Defendant

is of paramount importance. It is well established that the results of lie detector tests are universally recognized not to be admissible in evidence by either a Defendant or the prosecution for the purposes of establishing the innocence or guilt of the accused. State v. Hagal, 9 Ohio App. 2d 12 (2d Dist. 1964). Since such a test is uniformly held not to be judicially acceptable, it follows that neither a professed willingness nor refusal to submit to such a test should be admitted. Id., at 668.

"Evidence that the accused or a witness has taken a polygraph test is inadmissible." United States v. Brevard, 739 F 2d 180, 182 (4th Cir. 1984). The court may, when an impermissible reference to a polygraph test has been interjected, attempt to cure the error by striking the evidence and instructing the jury to disregard it. Id., at 182.

> [There are instances where the jury is exposed to inadmissible evidence which could make such a strong impression that instructions to disregard it may not remove its prejudicial effect." Id., at 182.

There are two questions to consider in determinint whether a curative instruction or a mistrial is appropriate after a reference to a polygraph test: (1) whether an inference about the result of the test may be critical in assessing the witness' credibility, and (2) whether the witness' credibility is vital to the case. Id., at 182.

The Defendant in the Brevard case had to prove his innocence in the fact of conflicting evidence. Id., at 180. Also, there were two references to the Defendant taking a polygraph test in Brevard. Id., at 180. The court found the remarks about the polygraph test prejudiced the Defendant whose credibility was crucial to determining his innocence or guilt. Id., at 180. The prejudice was found even though at trial the court ordered the jury to disregard the remarks pertaining to the polygraph test. Id., at 180.

The Brevard case is analogous to the case at hand. On two instances the prosecution made remarks concerning Mr. Tillimon's

willingness or unwillingness to take a polygraph examination and the crucial factor in the tillimon matter was the credibility of Mr. Tillimon. The prosecution undoubtedly wanted to attach Mr. Tillomon's credibility and what better way than to indicate there was a discrepancy between his testimony and the testimony of others as to the taking of a polygraph examination.

The obvious inference about unwillingness to take a polygraph test is that the Defendant has something to hide by refusint to take the test. Someone who has something to hide obviously casts doubt on his credibility. It is reasonable to believe that a member of the jury would wonder why the defense objected to the polygraph tests being mentioned in court if in fact the Defendant were willing to take the test. The objection and the unavoidable emphasis on the polygraph because of the instructions of the court inevitably tend to lead the jury to believe that his testimony would not have been corroborated by the polygraph test results.

Secondly, because Mr. Tillimon's credibility is vital to this case and that the only

other testimony came from persons who were also interested parties. The inference that Mr. Tillimon was unwilling to take a polygraph test would tend to persuade the jury to resolve any conflicts in testimony against Mr. Tillimon.

The other factor that enters into questions of credibility is the innuendo about Mr. Tillimon's sexual preferences that permeated the cross-examination of Mr. Tillimon and the remarks made in closing by the prosecution; the obvious inferences that a single man must undoubtedly have some unacceptable sexual preferences. This, coupled with the impermissible attack on Mr. Tillimon's credibility through questioning concerning polygraph examinations was a very potent force in persuading the jury to return a verdict of guilty.

III. CONCLUSION

Defendant would urge that the evidence was insufficient to sustain the verdict reached

by the jury. That insufficiency is more than summed up by the statement that was made by Antonio Hernandez to the investigating officer, Detective Wilbur. The statement is as follows:

> I told my dad he did it but I am really not sure.

The testimony of those persons who were present would belie the conclusion that a person who was attempting to sexually gratify himself would do it in front of two other adult witnesses and another child witness in an area in which anyone could walk in at any moment. The evidence simply did not rise to that level that permitted the jury to come to the conclusion that the Defendant was guilty beyond a reasonable doubt. On that basis a new trial should be granted because the verdict was not sustained by sufficient evidence.

Further, the key factor in this particular trial was the Defendant's credibility.

The impermissible references on two occasions to polygraph examinations, one of which was made directly to the Defendat, so compromised the jury's ability to arrive at a fair and impartical verdict that no curative instruction could remove the taint given by that area of questioning. References to the polygraph were made knowingly and the prejudicial effect is obvious.

Based upon the insufficiency of the evidence and the impermissible questioning regarding the willingness or unwillingness to take a polygraph examination dictates that the Defendant should be granted a new trial pursuant to Rule 33 of the Ohio Rules of Criminal Procedure.

N. Stevens Newcomer (S)

N. Steven Newcomer
Counsel for Defendant

CERTIFICATION

This is to certify that a copy of the foregoing Motion and Memorandum was sent to Mr. Dean Mandross, Prosecutor's Office, Lucas County Courthous, Toledo, Ohio 43624,

on this the 11th day of July, 1988.

N. Stevens Newcomer (S)

N. Stevens Newcomer
Counsel for Defendant

NO. CR 88-5607

IN THE COURT OF COMMON PLEAS,
LUCAS COUNTY, OHIO

STATE OF OHIO,	*	FILED
Plaintiff,	*	May 1, 1988
vs.	*	INDICTMENT
DUANE TILLIMON,	*	
Defendant.		

* * *

INDICTMENT

THE STATE OF OHIO,)
Lucas County,) SS.

Of the January Term of 1988, A.D.

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present the DUANE JOSEPH TILLIMON, on or about the 19th day of March, 1988, in Lucas County, Ohio, did have sexual contact with Antonio Hernandez, not his spouse, the said Antonia Hernandez being less than thirteen

(13) years of age, in violation of §2907.05 (A) (3) of the Ohio Revised Code, being a felony of the third degree, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Anthony G. Pizza (S)

Anthony G. Pizza
Lucas County Prosecutor

OHIO STATUTES UNDER WHICH PETITIONER WAS PROSECUTED

Ohio Revised Code provides in parts here material:

> (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender, or cause two or more other persons, to have sexual contact when any of the following apply:
>
> (1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.
>
> (2) For the purpose of preventing resistance, the offender substantially impairs the other person's, or one of the other persons', judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.
>
> (3) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of such person.
>
> (B) Whoever violates this section is guilty of gross sexual imposition. Violation of division (A)(1) or (2) of this section is a felony of the fourth

degree. Violation of division (A)(3) of this section is a felony of the third degree.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

No. 89-1657

IN THE

Supreme Court of the United States

October Term, 1989

DUANE JOSEPH TILLIMON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Now comes the Respondent, State of Ohio, by and through Dean P. Mandross, Assistant Prosecuting Attorney of Lucas County, Ohio, and respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Supreme Court of Ohio.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE PETITIONER HAS FAILED TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

The Supreme Court of the United States, pursuant to 28 U.S.C. Section 1257(3) has jurisdiction to review cases in state courts by way of certiorari in three situations: (1) where the validity of a federal treaty or statute is drawn in question; (2) where the validity of a statute is drawn in questioning the ground of its being repugnant to federal law; and (3) where a title, right, privilege, or immunity is set up or claimed "under the constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

It is fundamental to the jurisdiction of the Supreme Court pursuant to Section 1257 that there must be presented a substantial federal question and that the question has been properly raised in the state court proceeding. The federal question presented must be more than a formal one and must not be so devoid of merit as to be frivolous. Nor can it be foreclosed by prior decisions of the Supreme Court so that there is no real controversy. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308 (1902). Any federal issue not meeting these standards is considered insubstantial and is cause for dismissal of an appeal or a denial of a petition for writ of certiorari. *Zucht v. King*, 260 U.S. 170 (1922); *Palmer Oil Corp. v. Amerada Corp.*, 343 U.S. 390 (1951).

The issues raised by the Petitioner fail to meet the requirement of a substantial federal question. There is no new or novel constitutional question presented and the case will affect few individuals, if any, other than the Petitioner.

II. THE PETITION FOR CERTIORARI SHOULD BE DENIED FOR THERE IS AN ABSENCE OF A LEGAL CONTROVERSY.

The Supreme Court generally will not grant certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved. In *United States v. Johnson*, 268 U.S. 220, 227 (1924), the Court held, "We do not grant certiorari to review evidence and discuss specific facts".

This policy has most often been followed in cases such as this one where two separate appellate courts have concurred regarding the sufficiency of the facts.

As stated in *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271 (1948):

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.

Petitioner seeks to have this Court make a review directly contrary to the holdings of *Johnson* and *Linde Co., supra*. Petitioner would have this Court believe that the victim was five (5) years old (Petitioner's Writ, pages 1A, 1B, 16), when in fact he was seven (7). Additionally, Petitioner bastardizes the facts in arguing that the victim "wasn't sure defendant did anything."

The evidence at trial showed that the Defendant touched the genitals of a seven (7) year old boy, for the purpose of sexual gratification. The evidence showed that the Defendant had developed a scam wherein he would purportedly assist young children in using the restroom facilities and that while tucking in their clothing, Defendant would take that opportunity to touch and feel their genitals.

Antonio Hernandez testified that on the date in question he was at the Northtowne Mall with his mother, father, and younger brother. While at the mall they stopped to have lunch at McDonalds. Antonio testified that while the rest of his family was ordering food, he went to use the restroom facilities.

The restroom at McDonalds was described as having two (2) separate rooms. The first room, contained the sink and an electric hand dryer. The second room, which was separated from the first by a solid door, contained two (2) urinals and a toilet facility. Antonio testified that while in the restroom, the Defendant was also present.

The victim went on to describe the actions of the Defendant-Petitioner, wherein he pulled Antonio's pants down and purportedly attempted to assist Antonio in using one of the urinals by lifting him up. Antonio testified that he pulled his pants up and told the man that he didn't have to use the facilities. After being set down, Antonio tried to get into the toilet stall but the door was stuck. The Defendant opened the door and again pulled Antonio's pants down a second time and watched while Antonio used the facilities. Antonio then left this portion of the restroom and entered the sink area.

It was at this time that Mr. Hernandez entered the restroom along with his youngest son. Mr. Hernandez recalled that as Antonio came out of the urinal area, he was closely followed by the Defendant. Antonio went on to testify that while at the sink, and while attempting to wash his hands, the Defendant pulled his pants down for a third time and under the guise of tucking in his shirt, touched his penis and butt. Mr. Hernandez, who was in the second room of the restroom, testified that while

keeping an eye on his youngest son he leaned against the door to the sink area to check on his eldest son, Antonio. Mr. Hernandez testified that while so doing, he saw the Defendant's hand in his son's pants.

Mr. Hernandez testified that he closed the door momentarily to gather up his youngest son and that when he looked back into the sink area for a second time, the Defendant had left. Mr. Hernandez went on to decribe the reaction of his eldest son, who had rushed up to his father in an excited state with his face flushed and ears red, and recounted how his son had told him that the man who had just left had fondled his son's privates.

Mr. Hernandez immediately took his boys from the restroom area and left them with their mother while he searched for the Defendant. His search was unsuccessful and Mr. Hernandez testified that he returned to McDonalds and reentered the restroom as he had to use the facilities himself. While drying his hands, Mr. Hernandez noted that the Defendant reentered the restroom a second time, looked into the urinal area of the restroom and immediately left. Mr. Hernandez testified as to his efforts in following the Defendant, stopping him, and calling the authorities to speak with the Defendant.

The Petitioner took the stand and testified in his own behalf. The Petitioner, while admitting he did have his hands in the boy's pants, denied that he touched the boy's genitals and indicated that he was only trying to tuck the boy's shirt in. The Petitioner testified that he went to the mall specifically to pick up a screen door at Montgomery Wards, however he failed to adequately explain why he parked two-hundred (200) feet away from

Montgomery Wards and entered the mall through the McDonalds entrance. Moreover, he denied entering the restroom a second time and testified that both Mr. Hernandez and Mrs. Hernandez were lying about seeing him leave the restroom a second time.

Petitioner takes a portion of the victim's testimony out of context in a vain attempt to suggest that the victim testified that he really doesn't know what happened. Mr. Hernandez had described how his son had run up to him in an excited state and told him how the Defendant had touched his penis. Mr. Hernandez recounted that his son had gestured by waving his hand back and forth when describing what the Defendant had done to him (TR. 45). During Antonio's testimony the State attempted to have the seven (7) year old victim testify to exactly how he had described these events to his father.

> Q: (Mr. Mandross) Antonio, I'm not clear on something, and maybe you can help me with this. When you said that the man touched your penis—
>
> A: (Nodded affirmatively).
>
> Q: (Continuing)—can you tell me in a little more detail what exactly he did? Can you use your hand to show me?
>
> Mr. Newcomer: Objection, Your Honor. Can we approach the bench?
>
> The Court: Yes. (Thereupon, an off-the-record discussion was had at the Bench.)
>
> The Court: Objection is sustained.
>
> Q: (Mr. Mandross) Antonio, help me out there, can you?
>
> A: I'm not sure. I don't really know.

Q: Well, do you remember telling your dad what the man did?

A: Yes.

Q: What—how did you explain it to your dad?

A: I told him that he did it, but really, I really don't really know.

Q: You can't really describe it in more detail how he touched you?

A: (Indicated negatively)

As the Court can see from this exchange the child was testifying that he can't recall how he explained it to his father, not that he doesn't know what happened to him.

Moreover, counsel takes exception to Petitioner's claim that the prosecutor gave "hand signals" to the victim. The record is totally void of such evidence inasmuch as it did not take place.

A. Question Regarding Polygraph Was Not Prejudicial Or Erroneous.

Petitioner argues that the trial Court should have granted his motion for a mistrial because the State of Ohio on two (2) separate occasions improperly asked questions regarding the Defendant's willingness or unwillingness to take a lie detector test. It must be stressed that while the issue of a lie detector test was twice mentioned during the course of this trial the State was not directly responsible for the first occurrence. The evidence will show that while the State did bring up the issue the second time that it was justified in doing so.

The first mention of this procedure arose during the testimony of the victim's father, Mr. Gaspar Hernandez. During part of Mr. Herdandez's testimony the State tried to narrow into a particular statement of the Defendant by asking the following question:

> Q: Was there a point in time while you're in this hallway where he changes his story or admits to doing other things? (TR. 54).

At this point defense counsel makes the following objection:

> Mr. Newcomer: Objection. He can ask what what he stated. He's characterizing it. He can ask what the conversation was.
>
> The Court: I'm not sure that I understand the distinction.
>
> Mr. Newcomer: He is characterizing the testimony right now, and I think that he should just ask the question as to what was said.
>
> The Court: All right. (TR. 54).

As a result of defense counsel's objection, the State phrased the question as defense counsel requested:

> Q. Tell the jury what else Mr. Tillimon said during the course of the conversation with you and the officer? (TR. 54).

It is at this point, in answer to the above question, that Mr. Hernandez included in his response the statement of the Defendant indicating that he wouldn't take a polygraph unless Mr. Hernandez also took one.

The above readily shows that the State did not intentionally elicit testimony about this polygraph procedure. The State had attempted to narrow its questioning to elicit testimony on a different subject. It was only in response to defense counsel's objection that

the State was forced to ask the much more broad and open ended question in which Mr. Hernandez recounted the Defendant's statements about the polygraph examination. As such, the State cannot be held responsible for the above testimony.

Moreover, the Court granted defense counsel's motion to strike the testimony and properly instructed the jury to disregard reference to the polygraph test (TR. 55, 56).

However, during the course of the cross examination of the Defendant, this topic was raised by the State of Ohio. It is critical that this Court understands the context in which this subject was raised. During the course of the Defendant's direct examination, his attorney elicited testimony to the effect that the Defendant, on the evening after this occurrence, composed a written statement as to everything that occurred while at the mall. It was further testified, that this statement was given to the authorities including the prosecution:

> Defendant: What I did? I went home that night and I wrote down everything that happened to me from the time of the incident until that time.
>
> Counsel: O.K. And do you recall whether or not that particular information was ever given to anyone?
>
> Defendant: Yes.
>
> Counsel: Who was it given to?
>
> Defendant: Immediately after I wrote it?
>
> Counsel: Just who ever.
>
> Defendant: We interviewed three (3) attorneys, including yourself, and we gave each attorney a copy of my statement.

Counsel: Now, a copy of this was also—was a copy of this also given to the prosecution?

Defendant: Yes.

Counsel: Alright. *And they have a copy in their possession*?

Defendant: Yes. (TR. 234, 235).

This ploy by defense counsel was an attempt to improperly bolster the Defendant's credibility. The obvious inference to be drawn from this testimony was that if the Defendant wrote down everything that happened, gave that information to the prosecution and the State offered no evidence to rebut the contents of this statement, that the statement must be true and thus the Defendant must be being truthful. In point of fact the Defendant's written statement contained "facts" which the State could prove were not true. Moreover it must be stressed that it was the Defendant who brought the issue of the contents of this statement before the jury.

During cross-examination, the State of Ohio endeavored to show that the written statement of the Defendant was inaccurate and self serving. The start of this line of questioning is reflected on page 246 of the trial transcript wherein the Defendant acknowledged that he made a conscious effort to write down everything that happened as best as he could recollect it.

The State initially asked questions to emphasize that this written statement did not actually include some important facts:

Q: Mr. Mandross. Show me—point out in there where you wrote down how you were waiting in line to order a coke.

A: I don't write that down specifically. I say a man approached me in the restaurant.

After bringing out certain inconsistencies, the State then asked:

> And it is your testimony that in the presence of Mr.—or Officer Holt, you indicated that you would take a lie detector test, or there was some talk about taking a lie detector test? (TR. 252).

The purpose of this question, as indicated during the in chambers discussion between the Court, defense counsel and State, was to point out an additional false statement which was included in Defendant's supposedly accurate written statement of what had occurred on this day. The State's Exhibit 11 (Defendant's written statement) reflects that the Defendant wrote, in his own hand, "the officer said to me, will you take a lie detector test? I said, yes." As the State indicated in its proffer for the record, it would have been Officer Holt's testimony that he (Officer Holt) never asked anyone to take a lie detector test (TR. 263). The obvious purpose for the State's question was to point out that the Defendant was making false and self serving statements. This question was designed to rebut the inference created by defense counsel's questioning regarding this "supposedly" accurate written statement made by the Defendant. Thus, the State was attempting to fulfill the basic premise of cross-examination; to attack this declarant's credibility by showing that he has made false statements.

The Defendant attempted to create the false impression with the jury that he had openly and honestly outlined the entirety of the situation and provided same to the prosecution. Though many of his "facts" in this written statement were false, he now argues that the State should be foreclosed from displaying these deceptions to the jury. The United States Supreme Court has long recognized that a

Defendant "has no right to set forth to the jury, all the facts which tend in his favor without having himself open to a cross-examination upon those facts." *Fitzpatrick v. United States,* 178 U.S. 304, 315 (1900). Moreover, this Court has stated "that unless prosecutors are allowed wide leeway in the scope of impeachment cross-examination, some Defendant's would be able to frustrate the truth searching function of a trial by presenting tailored defenses insulated from effective challenge. *Doyle v. Ohio,* 426 U.S. 610 (1975) [at footnote seven (7)]. Again, this is precisely what the Defendant sought to accomplish. The fact that one of the false statements concerned a polygraph examination should not have foreclosed the State from asking questions regarding that fact. It must be emphasized that the State asked "whether there was some talk about taking a lie detector test." (TR. 252). As the State indicated to the trial Court, it was not asking whether the Defendant took the test or not, nor was it interested in the results of any supposed test. The purpose of the question was to set a foundation to show that the Defendant had made false comments in his written statement (TR. 256).

Moreover, Ohio Rule of Evidence 611 states: "cross-examination shall be permitted on all relevant matters and matters affecting credibility." Clearly proof that the Defendant has made written statements which are false goes to his credibility. As Petitioner's counsel repeatedly points out, this is a case in which the credibility of the Defendant is paramount. Thus, proof that he has made false statements constitutes relevant and admissible evidence in this matter. Moreover, it has long been the law in Ohio and other jurisdictions that a witness can be cross-examined with reference to a written statement previously made and signed by him concerning the facts under investigation. *Babitt v. Say,* 120 Ohio St. 177 (1929).

Such questioning was proper and made in good faith by the State of Ohio as evidenced by its proffer. Moreover, the Court sustained the defenses' objection, and gave a lengthy curing instruction, in which the jury was told to disregard any reference to the polygraph examination (TR. 254). Thus, the Defendant was not prejudiced.

A case that should provide guidance for this Court is *State v. Holt*, 17 Ohio St. 2d 81, 46 O.O. 2d 408 (1969). Appellant Holt claimed prejudicial error on the part of the trial judge for not ordering a mistrial pursuant to his motion when the State's witness testified that the Defendant had taken a lie detector test and failed it. The Ohio Supreme Court in acknowledging that such testimony was "no doubt damaging to the defendant" stressed that the trial Court promptly instructed the jurors to disregard such testimony. The Ohio Supreme Court then held "in view of the Court's immediate action in this respect, we do not feel justified in holding that the judge's refusal to order a mistrial was prejudicial error." Thus if the Ohio Supreme Court found that testimony referring to the fact that a Defendant took and failed a polygraph test does not warrant a mistrial in light of a trial Court's limiting instruction, then certainly this trial Court was not in error in refusing to grant a mistrial when there was no testimony as to the Defendant failing to pass a polygraph test. This is especially true since the State had a legitimate basis in asking the question.

Additionally, none of the cases cited by the Petitioner are factually relevant. The question posed by the State was:

> "You indicated that you would take a lie detector test, or there was some talk about taking a lie detector test?"

Cases cited by Petitioner all involve evidence that the accused took a polygraph (*United States v. Brevard*, 739 F.2d 18) or refused a polygraph (*State v. Kolander*, 52 N.W.2d 458, etc.). This is not the situation before this Court.

In conclusion, the State's original question had nothing to do with the results of any polygraph test. The question was asked to attack the Defendant's credibility and to rebut the false inference that the Defendant had been completely open and honest with the authorities.

It must be stressed that it was the defense which raised the issue of the written statement. Though obviously aware of its contents, the defense never requested a motion in limine. This raises the issue as to whether the defense sought to create a mistrial knowing the State would raise the polygraph issue since it was a fabrication on the Defendant's part.

Finally, the Defendant was not prejudiced in light of the Court limiting introduction and the fact that no reference was made as to whether any such test was ever taken.

CONCLUSION

Based upon the aforementioned law and the facts of the case, none of the issues raised by the Petitioner should be reviewed by this Court. The State of Ohio would respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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